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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-149

SAMUEL G. ALLEN, II,
Petitioner,

—v—

BANKERS TRUST COMPANY and
BUDINGTON, ST. JOHN & PARK,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SAMUEL G. ALLEN, II
Petitioner, pro se
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IN THE

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SAMUEL G. ALLEN, II,

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BANKERS TRUST COMPANY and
BUDINGTON, ST. JOHN & PARK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on May 3, 1971.

Jurisdiction

The judgment of the Court of Appeals was entered on May 3, 1971. A Petition for Rehearing En Banc was denied on June 1, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The Questions Presented

1. Whether allegation of public injury or of a significant effect upon interstate commerce at large is prerequisite to maintaining a private action for treble damages under 15 U.S.C. §§ 1 and 15.

2. Whether the District Court erred in ruling a collateral estoppel by a decree of a Connecticut Court of Probate which, under the laws of its sovereign, has no jurisdiction to determine the issues in question.

Constitutional Provisions and Statutes Involved

I. *Constitution of the United States, Amendment VII*

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

II. *Sherman Act of 1890, Section 1 (15 U.S.C. § 1)*

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided,* That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy nor or hereafter in effect in any State, Territory, or the

District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes", approved September 26, 1914: *Provided further,* that the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. *26 Stat. 209, amended 50 Stat. 693, 69 Stat. 282.*

III. *Clayton Act, Section 4 (15 U.S.C. § 15)*

That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. *38 Stat. 731.*

Statement

Petitioner's father, Betram S. Allen, died a resident of Greenwich, Connecticut on August 24, 1961. His last will and testament, dated July 14, 1960, was admitted to probate in the Probate Court for the District of Greenwich on September 13, 1961. On September 18, 1961 petitioner's mother, Carolyn H. Allen, respondent Bankers Trust Company, and petitioner were appointed executors of said will and thereafter served in that capacity during all proceedings with respect to the Allen estate.

Although initially desirous of retaining co-counsel, respondent Bankers Trust Company acceded to the wishes of petitioner and his mother that the Allens' own attorney, Orson L. St. John of the respondent firm Budington, St. John & Park serve as attorney for all the executors. Petitioner and his mother had had a long professional relationship with Mr. St. John and had arrived at a favorable arrangement with him concerning his charges for services to the Allen estate (R. 3, p. 282; R. 5, Exhibit D). One of Mr. St. John's initial assignments on behalf of the Allens was to negotiate with Bankers Trust Company concerning its fee for services as managing co-executor of the Allen estate inasmuch as Bankers Trust Company appeared not to recognize, or to be unaware of, an ante-mortem agreement on that subject between Bankers Trust Company and the decedent, Bertram S. Allen (R. 5, Exhibit D). Instead of negotiating, representatives of Bankers Trust Company and the St. John firm conspired to defeat any prior agreements they may have had with the Allens and to fix their own fees for administering the Allen estate (R. 25 ¶ 7; R. 2, pp. 217, 218; R. 4, pp. 373 ff.). Having sole custody of the estate's assets, Bankers Trust Company was in a position to dictate terms (R. 25 ¶ 8).

On June 24, 1965 Bankers Trust Company presented its final account for the Allen estate to the Probate Court for

the Disrict of Greenwich for approval and filing Schedule "C" of the final account entitled "Statement Showing All Funeral and Administration Expenses and Estate Taxes Paid from Principal" showed, as items of expense, such fees to the respondents, Bankers Trust Company and Budington, St. John & Park, as they had agreed upon between themselves (R. 5, Exhibit B).

A hearing on the allowance of the final account was held at the Probate Court for the District of Greenwich on or about September 9, 1965. Petitioner and his mother appeared at said hearing and raised the question of their agreement with Mr. St. John. They were represented by counsel, who submitted a memorandum on their behalf urging that Bankers Trust Company be surcharged for fees in excess of those provided for in the agreement with the Allens (R. 5, Exhibit D). A memorandum in opposition was submitted by respondents Budington, St. John & Park on behalf of Bankers Trust Company wherein they stated:

> This is not a situation where there is disagreement between the attorneys and the executor of an estate as to the amount which should be paid. Under those circumstances the Probate Court would not be a proper forum in which to determine the amount of a claim which ought to be paid out of an estate (Section 52-202 of the General Statutes.) *** Under these circumstances the Bankers Trust Company has taken the proper courses in filing its accounting and seeking indemnity to which it is entitled subject to the proper exercise of discretion by the Court (Ballard v. Ballard, 13 Conn. Sup. 400, 402). In the exercise of this discretion the Probate Court is not required to act as a trial court. If it is satisfied that the Bankers Trust Company acted in good faith and according to its honest judgment, then Bankers Trust Company is

entitled to the credits requested in the accounting (Ballard v. Ballard, Ibid., 409).
R. 5, Exhibit C, p. 7

The Judge of Probate accepted the respondents' arguments and on December 15, 1965 ordered the said account accepted and filed without adjustment (R. 5, Exhibit E).

On April 6, 1966 respondent Bankers Trust Company paid the disputed amounts as shown in said final account to itself and to co-respondent Budington, St. John & Park and charged both amounts against the assets of the Bertram S. Allen estate.

On April 2, 1970, four days before the fourth anniversary of the payments alleged, petitioner Samuel G. Allen II brought an action in the United States District Court for the District of Connecticut charging that as a result of the conspiratorial agreement between respondents Bankers Trust Company and Budington, St. John & Park the fees charged against the Bertram S. Allen estate were larger than they otherwise would have been, and seeking treble recovery for the excess under the authority of the Sherman and Clayton Antitrust Acts, 15 U.S.C. §§ 1 and 15. Respondent Budington, St. John & Park moved to dismiss, contending that there was in the Complaint an insufficient allegation of an effect upon interstate commerce at large to state a claim upon which relief could be granted. Respondent Bankers Trust Company filed an answer and moved for summary judgment, contending, *inter alia,* that the petitioner is collaterally estopped from challenging the expense items by virtue of the fact that they had appeared on respondent's final account to the probate court, had been debated before that court, and had been accepted by it. On September 23, 1970 the District Court granted both motions and dismissed the Complaint. Judgment for the respondents was entered on September 24, 1970 and affirmed by the United States Court of Appeals for the Second Circuit on May 3, 1971.

Reasons for Granting the Writ

1. *The ruling of the lower courts conflicts with controlling decisions of this Court and also with a decision of the United States Court of Appeals for the Eighth Circuit.*

This Court has on several occasions reversed the dismissal of a private antitrust action for failure to allege an adverse effect upon the economy as a whole; *Radovitch* v. *National Football League,* 352 U.S. 445, 453 (1957); *Klor's Inc.* v. *Broadway-Hale Stores, Inc.,* 359 U.S. 207 (1959); *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.,* 364 U.S. 656 (1961). In *In re McConnell;* 370 U.S. 230, 231 (1962) Mr. Jusice Black summarized the Court's guideline in such cases:

> *** we have held that the right of recovery of a plaintiff in a treble damage antitrust case does not depend at all on proving an economic injury to the public.

This guideline was followed by the Eighth Circuit in reversing the dismissal of a private antitrust suit in *Arthur Murray, Inc.* v. *Reserve Plan, Inc.,* 406 F.2d 1138 (8th Cir., 1969).

The petitioner seeks to recover damage resulting from a particular instance of the arbitrary fixing of fees for services. The fixing of fees for services is to be equated, under the Antitrust laws, with the fixing of the price of goods or commodities *United States* v. *National Association of Real Estate Boards,* 339 U.S. 485 (1950), the latter having been defined as violative of the antitrust laws "per se." *Northern Pacific Railway Co.* v. *United States,* 356 U.S. 1, 5 (1958).

The feature by which the lower courts distinguished the petitioner's case is its smallness of scale, the business

activities in question being of temporary duration and the ad damnum small. Statute, however, provides that such an action may be brought irrespective of the amount in controversy (15 U.S.C. § 15), and this Court has ruled that a plaintiff need allege only damage to his own interests. The business involved is "interstate commerce" because the defendants (respondents) are residents of different states and were conducting business in common. They had thus entered into the flow of interstate commerce even though they might deal in nothing more tangible than information *Gibbons* v. *Ogden*, 22 U.S. 1 (9 Wheaton, 1824) *Associated Press* v. *National Labor Relations Board*, 301 U.S. 103, 128 (1937). Actionability is determined by the nature of the offense rather than by its extent *Klor's Inc.* v. *Broadway-Hale Stores, Inc., Cit. supra,* p. 213; *National Labor Relations Board* v. *Fainblatt*, 306 U.S. 601, 606 ff. (1939).

2. *The lower courts effectively abrogated the petitioner's right to trial by jury guaranteed by the Seventh Amendment to the Constitution of the United States.*

At least two circuits have upheld the parties' right to a jury trial in a private antitrust action seeking damages *Meeker* v. *Lehigh Valley R. Co.*, 162 F. 354 (2d Cir. 1908); *Siegfried* v. *Kansas City Star Co.*, 298 F.2d 1 (8th Cir., 1962), *cert. denied* 369 U.S. 819. The District Court effectively denied the right of trial by jury by ruling that the essential issues had been fully and conclusively adjudicated by a Connecticut Court of Probate—a court lacking the power to empanel a jury.

The petitioner does not claim that the Seventh Amendment grants a right of trial by jury where none previously existed but merely that it prohibits the Congress or the federal courts from denying that right when it exists under the common law. The petitioner has such a right.

Connecticut law recognizes that although the probate courts of that State may make provisional findings on matters outside their limited statutory jurisdiction, such findings are not conclusive and may be redetermined by a court of appropriate jurisdiction *Brownell* v. *Union & New Haven Trust Co.*, 143 Conn. 662, 124 A 2d 901 (1956); Locke & Kohn, *Connecticut Probate Practice* (1950) V. I, §§ 140, 141.

The petitioner's claim for damages is based on the existence, validity, and effect of two agreements: an ante-mortem agreement between decedent Bertram S. Allen and Bankers Trust Company, and a contract of employment between Carolyn and Samuel Allen and Mr. St. John arising incident to the administration of the Allen estate. The Connecticut probate courts have no jurisdiction to find, adjudicate, or construe either type of agreement *Hewitt's Appeal,* 53 Conn 24, 1 A 815 (1885); *Mallory's Appeal,* 62 Conn 218, 222, 25 A 109 (1892); *Havens' Appeal,* 69 Conn 684, 701, 38 A 795 (1897); *State ex rel. Moriarty* v. *Donahue,* 82 Conn 308, 73 A 763 (1909); *Schwartz* v. *Schwartz,* 104 Conn 271, 132 A 461 (1926); *Marks' Appeal,* 116 Conn 58, 163 A 600 (1932); *Lockett* v. *Doyle,* 148 Conn 639, 173 A 2d 507 (1961).

The respondents' activities constitute a breach of fiduciary duty. In Connecticut an action to recover damages for breach of fiduciary duty is an action at law, triable by a jury *Dettenborn* v. *Hartford National Bank & Trust Co.,* 121 Conn 388, 393, 185 A 82 (1936) but neither the probate court nor its appeal tribunal, the Superior Court, has the power to empanel a jury, *Ibid.* The petitioner did not institute the probate proceedings in question (R. 5, Exhibit B, p. 1), nor has he ever waived the right of trial by jury.

In arguing that the probate court would not be a proper forum to try dispute over the amount to be paid (*Statement, supra*), respondents Budington, St. John & Park were quite correct. Under Connecticut law the petitioner would be permitted to try this question in a court of law, and any provisional findings of the probate court on questions of contracts would not create an estoppel. By ruling that the probate findings on these matters were final, where the Connecticut courts would not have done so, the District Court effectively denied the petitioner the right to try the facts to a jury.

It is desirable that the Court rule upon the question of whether or not such action by a Federal District Court violates the provisions of the Seventh Amendment to the Constitution of the United States.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

July 30, 1971

SAMUEL G. ALLEN, II
Petitioner, pro se

APPENDIX A

Memorandum of Decision

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil No. B-44

SAMUEL G. ALLEN, II,

Plaintiff,

v.

BANKERS TRUST COMPANY and
BUDINGTON, ST. JOHN & PARK,

Defendants.

The plaintiff, an attorney and the residuary legatee of one of two trusts created by his deceased father, brings this antitrust action pro se against the executor and the attorneys of his late father's estate. In sum, the plaintiff alleges that the defendants have diminished the estate and the trusts created therein by excessive fees charged in the probate court proceedings. Faced with an adverse and unappealed ruling by the judge of the probate court on exactly the same point, the plaintiff now seeks to relitigate the issue in the federal court under the antitrust laws.

The material facts are not in dispute. Plaintiff's father, Bertram S. Allen, died a resident of Greenwich, Connecticut on August 24, 1961. His will was admitted to probate in the Probate Court for the District of Greenwich on September 13, 1961. On September 18, 1961, plaintiff's mother, Carolyn H. Allen, defendant Bankers Trust Company, and

plaintiff were appointed executors of the estate. At the request of plaintiff and his mother, defendant Bankers Trust Company retained the law firm of Budington, St. John and Park as the attorney for the executors of the estate. The defendant Bankers Trust has its principal place of business in New York City; the firm of Budington, St. John and Park is a partnership of practicing lawyers in Greenwich, Connecticut.

The will created a marital deduction trust in favor of plaintiff's mother, who was given a power of appointment over its corpus. Were this appointment not to be exercised and were plaintiff's mother to predecease him, the residuary estate was to pass to plaintiff. A second nonmarital trust was also created, which named plaintiff's mother a lifetime income beneficiary. The trustees were given discretionary power to invade the principal for the maintenance and support of plaintiff's mother. Upon her death, should she predecease plaintiff, the remaining corpus of the trust, if any, was to be paid to plaintiff. The plaintiff's mother is still living, and both trusts have been funded and are being administered.

On June 24, 1965, the final accounting with respect to the estate was filed in the Greenwich Probate Court. The account included fees to the executor Bankers Trust of $26,770.47, and to the defendant Budington, St. John and Park for legal services and disbursements of $18,217.30. A hearing on the allowance of the account was held before Probate Judge Burke on July 7, 1965. Plaintiff and his mother appeared wtih new counsel and opposed the allowance of attorneys' fees.

On December 15, 1965, Judge Burke after a hearing ordered the final account to be filed without change. He found that "on the basis of the nature and size of the

estate and customary fees in similar matters" the legal fees were reasonable. Although Connecticut law permits an aggrieved party to appeal an order on a final account, Conn. Gen. Stat. § 45-288, no review was sought by the plaintiff or his mother. On April 5, 1966, distribution according to the terms of the final account was made.

Almost four years later, on April 2, 1970, the plaintiff commenced this action charging that the defendants conspired, in violation of the antitrust laws, to secure for themselves fees in excess of the reasonable value of the services rendered in the administration of the estate. Paragraph 7 of the amended complaint reads in pertinent part that "the defendants, by representatives of each, did contract, combine or conspire to assist each other, then and thereafter, in the pursuit of mutual or reciprocal benefits, including the securing of fees for each or for the other in excess of the reasonable value of the services rendered therefor." Jurisdiction of this court is invoked under the provisions of Section 4 of the Clayton Act, 15 U.S.C. § 15, to recover treble damages due to an alleged violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

The defendant Budington, St. John and Park moves to dismiss on the ground that the complaint fails to state a claim upon which relief can be granted, Rule 12(b)(6), Fed. R. Civ. P.; the defendant Bankers Trust Company requests summary judgment, Rule 56, Fed. R. Civ. P.; claiming, *inter alia,* that the action is barred by the principles of collateral estoppel. Both motions are granted.

It seems clear that the plaintiff's action cannot lie since neither the complaint nor the moving papers indicate any facts tending to show that interstate commerce was in any way affected by defendants' acts. This is a fatal defect in plaintiff's case. 15 U.S.C. § 1. Even assuming the truth

of the allegation that the out-of-state executor and the in-state attorney for the estate agreed and conspired to charge excessive fees, any possible effect on interstate commerce is too remote and inconsequential to satisfy the requirements of the Sherman Act. See, e.g., *United States* v. *International Boxing Club,* 348 U.S. 236, 243 (1954); *Sun Valley Disposal Co.* v. *Silver State Disposal Co.,* 420 F.2d 341, 343 (9 Cir. 1960); *Lieberthal* v. *North Country Lanes, Inc.,* 332 F.2d 269, 272 (9 Cir. 1964); *Bookout* v. *Schine Chain Theatres,* 253 F.2d 292, 295 (2 Cir. 1958); *Stewart* v. *Hevelone,* 283 F. Supp. 842, 846 (D. Neb. 1968); *L. S. Good & Company* v. *H. Daroff & Sons, Inc.,* 279 F. Supp. 925, 927 (N.D. W. Va. 1968).

Additionally, it appears that the plaintiff is collaterally estopped from maintaining this action. Under the doctrine of collateral estoppel a judgment on the merits in a prior suit between the parties precludes the relitigation in a subsequent action of any issue actually litigated and determined in the prior suit. *Lawlor* v. *National Screen Service Corp.,* 349 U.S. 322, 326 (1955); see also James, Civil Procedure § 11.18 (1965).

The plaintiff seeks to avoid the application of the doctrine on the ground that the probate court lacked jurisdiction to decide his antitrust violation claim. As is evident from his brief on the point, the plaintiff has confused the principles applicable to a defense of *res judicata* with the rules governing collateral estoppel. In *Lawlor* v. *National Screen Service Corp., supra,* at 326, the distinction between the two doctrines was succinctly stated as follows:

> [U]nder the doctrine of *res judicata,* a judgment "on the merits" in a prior suit involving the same parties or their privies bars a second suit based on the same

> cause of action. Under the doctrine of collateral estoppel, on the other hand, such a judgment precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit.

See also *Smith* v. *Alleghany Corporation*, 394 F.2d 381, 394-395 (2 Cir. 1968); *McNellis* v. *First Federal Sav. & L. Ass'n of Rochester, N.Y.*, 364 F.2d 251, 254 (2d Cir. 1966); *James L. Saphier Agency, Inc.* v. *Green*, 293 F.2d 769, 773 (2 Cir. 1961); *Carroll* v. *Associated Musicians of Greater N.Y., Local 802*, 235 F. Supp. 161, 174 (S.D.N.Y. 1963).

Here the question of the reasonableness of the fees charged in the Bertram S. Allen Estate was fully litigated and determined by Judge Burke. His order on the final account was not appealed, the fees of the executor and the attorney were paid pursuant to the order, and for over four years the trusts have been administered with the fund established by the final account. The fees issue should not now be reopened and relitigated.

Accordingly, the motion of defendant Budington, St. John and Park to dismiss is granted; the motion of defendant Bankers Trust Company for summary judgment is granted.

Dated at New Haven, Connecticut, this 21st day of September, 1970.

ROBERT C. ZAMPANO
United States District Judge

APPENDIX B

Judgment

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil No. B-44

SAMUEL G. ALLEN, II,

Plaintiff,

v.

BANKERS TRUST COMPANY and
BUDINGTON, ST. JOHN & PARK,

Defendants.

The Court having filed on September 23, 1970, its Memorandum of Decision granting the Motion of defendant Budington, St. John and Park to dismiss and granting the Motion of defendant Bankers Trust Company for summary judgment, it is

ORDERED and ADJUDGED that this action is dismissed on the merits and that defendants have heir costs.

Dated at Bridgeport, Connecticut, this 24th day of September, 1970.

GILBERT C. EARL, Clerk

By: THOMAS A. GRIMES
Chief Deputy Clerk

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

Brief For Respondent Bankers Trust Company In Opposition

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August 26, 1971

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Brief For Respondent Bankers Trust Company In Opposition

QUESTIONS PRESENTED.

1. Must petitioner's action seeking treble damages for violation of the Sherman and Clayton Antitrust Acts be dismissed for failure to allege or show that respondents' claimed conduct had an adverse affect upon interstate commerce?

2. Does petitioner's failure to raise constitutional questions in proceedings before the District Court and the Second Circuit Court of Appeals preclude consideration of those questions in this Court?

STATEMENT OF THE CASE.

A: The Course of Proceedings

Petitioner commenced this action on April 2, 1970, in the United States District Court for the District of Connecticut, seeking treble damages for alleged violations of the Sherman and Clayton Antitrust Acts, 15 U.S.C. §§1, 15. On June 1, 1970, petitioner filed an amended complaint. Respondent, Bankers Trust Company, answered the amended complaint and moved for summary judgment, contending, **inter alia,** that the amended complaint failed to state a claim upon which reilef can be granted; and that petitioner is collaterally estopped from maintaining this action by virtue of a certain order and decision of the Probate Court for the District of Greenwich, Connecticut, rendered December 15, 1965.

On September 23, 1970, the District Court, having heard the parties, filed its memorandum of decision granting respondent Bankers Trust Company's motion for summary judgment. (Exhibit A to the petition). Judgment entered on September 24, 1970, in accordance with said memorandum of decision, dismissing the action on the merits (Exhibit B to the petition).

Petitioner appealed said judgment to the United

States Court of Appeals for the Second Circuit where the judgment of the District Court was affirmed from the bench without written opinion on May 3, 1971. Petitioner's application for Rehearing En Banc was denied on June 1, 1971.

B: Facts

Petitioner's father, Bertram S. Allen, died a resident of Greenwich, Connecticut on August 24, 1961, leaving an estate inventoried at $1,146,751.64. The Last Will and Testament of Bertram S. Allen was admitted to probate in the Probate Court for the District of Greenwich on September 13, 1961.

Petitioner's mother, Carolyn H. Allen, respondent Bankers Trust Company and petitioner were appointed executors of said will and thereafter served in that capacity during all proceedings with respect to the Allen estate.

At the request of petitioner and Carolyn H. Allen, respondent Bankers Trust Company retained the respondent Budington, St. John and Park as attorneys for the executors of the Bertram S. Allen estate.

On June 24, 1965 the final accounting with respect to the Bertram S. Allen estate was filed in the Probate Court for the District of Greenwich by the respondent Bankers Trust Company. Schedule C of the final account entitled "Statement Showing All Funeral And Administration Expenses and Estate Taxes Paid From Principal" includes fees and disbursements of Orson L. St. John of the respondent Bud-

ington, St. John and Park for legal services and disbursements of $18,217.30.

A hearing on the allowance of the final account was held at the Probate Court for the District of Greenwich on September 9, 1965 before Judge L. Paul Burke.

Petitioner and Carolyn H. Allen appeared with counsel at the aforesaid hearing on the allowance of the final account and opposed the allowance of the aforementioned attorneys' fees of the respondent Budington, St. John and Park.

The Probate Court, having heard the evidence on the reasonableness of the attorneys' fees, the matter was fully submitted on briefs.

On December 15, 1965 the Probate Court entered an order allowing the aforesaid final account. In its memorandum of decision the Probate Court stated that:

> "This Court on the basis of the nature and size of the estate and customary fees in similar matters is of the opinion that the attorneys' fees and the appraisers' fees as set forth in said account are reasonable in amount, and since no other items of the account were objected to, that the account, as filed, should be allowed and an order will be entered accordingly."

Petitioner did not appeal the aforesaid order of the Probate Court to the Superior Court of Connecticut as he had a right to do pursuant to Connecticut

General Statutes §45-289, and the aforesaid order became final on January 15, 1966.

On April 2, 1970, petitioner commenced this action by filing a complaint charging that the respondents agreed, combined and conspired in violation of the Sherman and Clayton Antitrust Acts "to secure for Budington, St. John and Park an attorney's fee in excess of the reasonable value of its services rendered in the administration of the estate of Bertram S. Allen."

ARGUMENT.

I.

Petitioner Failed to Allege and Cannot Prove that the Complained of Conduct of the Defendants Affected Interstate Commerce.

Petitioner contends that the New York bank, as co-executor, and the Connecticut law firm, as attorneys for the estate, conspired to establish and pay excessive fees to the attorneys for services rendered in the estate administration.

The amended complaint and the moving papers fail to allege that the claimed conspiracy restrained interstate commerce, and it is apparent on the face of the record that no such restraint on commerce could have occurred. As the District Court observed, "This is a fatal defect in the plaintiff's case."

In determining what constitutes trade or commerce among the several states within the meaning

of the Sherman Anti-Trust Act the controlling consideration is ". . . the degree of interstate activity involved in the particular business under review." **United States v. International Boxing Club,** 348 U.S. 236, 243 (1954).

The courts have established two criteria for determining whether given activities sufficiently affect interstate commerce to support a civil action founded on the Sherman Act.

> "There are two tests to determine whether interstate commerce is involved. (1) whether the acts complained of occurred within the flow of interstate commerce; or, (2) whether the acts complained of while wholly intrastate, substantially affected interstate commerce." **Sun Valley Disposal Co. v. Silver State Disposal Co.,** 420 F.2d 341, 343 (9th Cir. 1969)

Petitioner concedes that he cannot establish wrongdoing which substantially affected interstate commerce (Plaintiff's Brief in the Second Circuit Court of Appeals, p. 6). Accordingly, petitioner relies entirely upon his abiilty to prove that the acts complained of occurred "within the flow of interstate commerce." (Plaintiff's Brief in the Second Circuit Court of Appeals p. 5-6) In support of the latter proposition, petitioner offers to prove that the administration of a Connecticut estate by a New York executor, represented by a Connecticut law firm "necessarily involves communication and the transmission of information" in interstate commerce (Plaintiff's Brief in the Second Circuit Court of Appeals, p. 8). Such allegation, if made and proved, is entirely insufficient to establish that the alleged con-

spiracy affected interstate commerce. The administration of a decedent estate in a Connecticut probate court is an intrastate matter. The fact that an executor is a New York bank and that the executor bank communicates with and transmits information to Connecticut attorneys for the estate, is incidental to the flow of interstate commerce and insufficient to convert a local activity into an interstate business. **Sun Valley Disposal Co. v. Silver State Disposal Co., (supra); Lieberthal v. North Country Lanes, Inc.,** 332 F.2d 269, 272 (2d Cir. 1964); **Bookout v. Schine Chain Theatres, Inc.,** 253 F.2d 292, 295 (2d Cir. 1958); **Stewart v. Hevelone,** 283 F.Supp. 842, 846 (D.Neb. 1968); **L. S. Good & Co. v. H. Daroff & Sons, Inc.,** 279 F.Supp. 925, 927 (N.D.W.Va. 1968).

Applying the above principle the District Court held that:

> "Even assuming the truth of the allegation that the out-of-state executor and the in-state attorney for the estate agreed and conspired to charge excessive fees, any possible effect on interstate commerce is too remote and inconsequential to satisfy the requirements of the Sherman Act."

II.

Petitioner's Failure to Urge or Brief in the Lower Courts Alleged Violations of his Constitutional Rights Precludes Consideration of Such Alleged Violations in This Court.

Petitioner asserts that the lower courts "effectively

abrogated" his right to trial by jury guaranteed by the Seventh Amendment to the Constitution of the United States (Petition p. 8). This contention is raised for the first time in the petition for certiorari. It was not raised or briefed in the District Court or in the Second Circuit Court of Appeals. Accordingly, it cannot be considered by this Court. **Tyrrell v. District of Columbia,** 243 U.S. 1 (1917); **California v. Taylor,** 353 U.S. 553, 557 n.2 (1957); **Lawn v. U.S.,** 355 U.S. 339, 362 n.16 (1958)

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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August 26, 1971

SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-149

SAMUEL G. ALLEN, II,

Petitioner,

—v.—

BANKERS TRUST COMPANY and BUDINGTON, ST. JOHN & PARK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO THE BRIEF FOR RESPONDENT BANKERS TRUST COMPANY OPPOSING THE GRANTING OF THE WRIT

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Petitioner, pro se
P. O. Box 121, Village Station
New York, N. Y. 10014

IN THE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO THE BRIEF FOR RESPONDENT BANKERS TRUST COMPANY OPPOSING THE GRANTING OF THE WRIT

The petitioner has petitioned the Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in the above-entitled action. Respondent Bankers Trust Company has filed a brief opposing the granting of the writ. Respondent Budington, St. John & Park has waived its right to do so.

Respondent urges, in part, that the Court not consider the petitioner's Second Question (*Petition*, p. 2) because the question of the abrogation of the petitioner's right to trial by jury was not raised in the courts below.

Certain rights of litigants are so fundamental as to be taken for granted. The Court will review "fundamental" errors even though they may not have been specifically noted or previously argued; *Sibbach* v. *Wilson & Co.*, 312 U.S. 1 (1941); *Hormel* v. *Helvering*, 312 U.S. 552, 557 (1941); *Ballard* v. *United States*, 329 U.S. 187 (1946); *United Brotherhood of Carpenters and Joiners of America* v. *United States*, 330 U.S. 395, 412 (1946).

The matter of denial of the right of trial by jury does not comprise the whole of the petitioner's Second Question, but is only a part of it. The question reads:

> 2. Whether the District Court erred in ruling a collateral estoppel by a decree of a Connecticut Court of Probate which, under the laws of its sovereign, has no jurisdiction to determine the issues in question.

The probate court's lack of jurisdiction to try the issues in question was argued at every stage of the proceedings below. To have jurisdiction over a cause means to have the power to try the cause by any means to which the parties may be entitled and to grant appropriate relief. The constitutional implications, which are of special interest to this Court, are contained in the question of jurisdiction.

The petitioner's Second Question contains, as subsidiary questions, not only the question of improper denial of the right of trial by jury but that of which law the federal courts are to apply in ruling on questions of collateral estoppel by the decree of a state court. In its briefs to the lower courts respondent Bankers Trust Company urged that in deciding whether or not probate decrees are subject to collateral attack the federal courts will apply state law. However, inasmuch as the action was brought under a federal statute (*Petition*, p. 6) the District Court's obliga-

tion to do so under the rule of *Erie* v. *Tompkins*, 304 U.S. 64 (1938) is very much in doubt. At issue is a novel question in the matter of State versus Federal law.

In dealing lightly with such questions the Court of Appeals may have intended that they be reserved for consideration by this Court. The Court should not be dissuaded from hearing them.

Respectfully submitted,

SAMUEL G. ALLEN, II,
Petitioner, pro se.

September 13, 1971

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-149

SAMUEL G. ALLEN, II,

Petitioner,

—v.—

BANKERS TRUST COMPANY and BUDINGTON, ST. JOHN & PARK,

Respondents.

PETITION FOR REHEARING

The petitioner prays for a rehearing of his Petition for a Writ of Certiorari, filed on July 31, 1971 and denied on October 12, 1971, to review the judgment of the United States Court of Appeals for the Second Circuit in the above-entitled action.

1. *The question of the improper denial of the right to trial by jury was raised below.*

On page 7 of respondent Bankers Trust Company's Brief in Opposition it was stated that the question of the improper denial of the petitioner's right to trial by jury cannot be considered by this Court because it was not raised in the courts below. The petitioner prepared and filed a reply on the basis that the respondent's statement was

correct. It has since been discovered that the point was, in fact, raised below, as is to be found on page 29 of the Appellant's Brief to the Court of Appeals.

2. *The court below knowingly and deliberately denied the petitioner due protection of the laws of the United States.*

The action was dismissed by the United States District Court for the District of Connecticut for failure to state a claim upon which relief could be granted under the statutes invoked. The United States Court of Appeals for the Second Circuit affirmed the dismissal while knowing it to be in error.

The following facts appear from the record of the appeal: 1) The law of the case was examined and briefed in great detail in the Court of Appeals. 2) The arguments and briefs in that court clearly show the dismissal to be erroneous. 3) The Court of Appeals affirmed the dismissal by the lower court without distinguishing the arguments *contra,* or indeed without handing down an opinion of any kind because "no interest would be served" thereby.*

As it had done in *Matthies* v. *Seymour Mfg. Co.,* 270 F.2d 365 (1959), the Court of Appeals had again come to the defense of the now notorious Connecticut probate practice. In *Matthies,* the Court of Appeals (Lumbard, J.) had reversed the District Court and dismissed the action on the question of the number of interested parties plaintiff necessary to justify maintaining a class action. Because of the largely discretionary nature of this ruling, the

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* *Lumbard, C. J.,* remark from the bench. The only comment made on the merits of the case was another remark from the bench (Kaufman, J.) that the petitioner had done "an excellent job."

Court was justified in denying certiorari (361 U.S. 962 (1960)). In the instant case, however, there is no room for discretion, and the dismissal is contrary to existing law.

Couched in language of high disdain, the opinion of the District Court, affirmed by the Court of Appeals (*Petition*, p. 1a), is nevertheless indefensible. No one has sought to have it reported. It draws its authority on the antitrust question from a criterion expressed in *United States* v. *International Boxing Club*, 348 U.S. 236 (1954), which had already been modified in *Radovitch* v. *National Football League*, 352 U.S. 445 (1957), and rejected, for all intents and purposes, thereafter (*Petition*, p. 7). It ignores the fact that the Connecticut probate courts have no jurisdiction to try contract disputes, and that any findings they may make or opinions they may render on such matters are, according to the principle of *Restatement*: Judgments §71, inconclusive. These points were examined and briefed in great detail in the Court of Appeals, which nevertheless saw fit to place the "interest" of the Connecticut Bar, as it saw it, outside the law. If the Bar exists to serve the public, rather than the reverse, the doctrine of "public policy" cannot justify such a ruling.

In *Radovitch* v. *National Football League*, *cit. supra*, at p. 454, this Court said:

> We think that Radovitch is entitled to an opportunity to prove his charges. Of course we express no opinion as to whether or not respondents have, in fact violated the antitrust laws, leaving that determination to the trial court after all the facts are in.

In the instant case the trial court and the Court of Appeals saw fit to decide that question before *any* facts were in.

With all due respect, the petitioner feels it his duty to emphasize that the Supreme Court cannot remain detached from this particular case, for by denying a review it would be affirming, if not the judgment of the court below, the proposition that the case should be run out of court as quickly and as quietly as possible. One then could say that the courts of the United States are corrupt—that they will quietly repudiate their own law for a particular case—and that the Supreme Court of the United States is likewise tainted. Such an example would aid disestablishmentarian forces far more than any ruling the Court could make upon hearing the case.

The phrase "Equal Justice Under Law" is enscribed on the front entablature of the Supreme Court building, no doubt in commemoration of the Court's work in enforcing the provisions of the Fourteenth Amendment to the United States Constitution in the state courts. Presumably the Court will keep its own house in order and enforce this principle in the federal courts as well, for it is expressed in the judicial oath of office (28 U.S.C. § 453). If not, the integrity of the Court will be compromised, its authority over the state courts eventually will be challenged, and "law and order" will suffer a major setback.

Respectfully submitted,

SAMUEL G. ALLEN, II
Petitioner, pro se

Constitution of the United States, Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 453 Oaths of justices and judges

Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: "I .... do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ..... according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States. So help me God." (62 Stat. 907)